

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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**Case Nos. A-5982, A-5983, A-5984, & A-5994
APPEAL OF DONALD MCGEE, MCGEE ENTERPRISES, AND GREENTREE
ASSOCIATES L.L.C.**

OPINION OF THE BOARD

(Hearings held June 9, July 13, 2004 and July 14, 2004)
(Effective Date of Opinion: February 1, 2005)

Case No. A-5982 is an administrative appeal filed by Donald McGee charging error on the part of the County's Department of Permitting Services (DPS) in issuing a Notice of Violation dated March 12, 2004, for offering to sell goods or services without a Montgomery County vendor license on the property located at 8804 Old Georgetown Road, Bethesda, Maryland 20814 (the Property).

Case No. A-5983 is an administrative appeal filed by Donald McGee charging error on the part of the County's Department of Permitting Services (DPS) in issuing a Notice of Violation dated March 12, 2004, for conducting retail sales in a residential zone on the Property.

Case No. A-5984 is an administrative appeal filed by Greentree Associates, L.L.C., charging error on the part of the County's Department of Permitting Services (DPS) in issuing a Notice of Violation dated March 30, 2004, for the extension of a nonconforming use at the Property.

Case No. A-5994 is an administrative appeal filed by Donald McGee, McGee Enterprises, d/b/a Salt River Lobster, charging error on the part of the County's Department of Permitting Services (DPS) in issuing a letter dated May 3, 2004, denying a vendors license for the sale of seafood in a residential zone at the Property.

Pursuant to Rule 1.7 of the Board of Appeals Rules of Procedure, the Board consolidated the four cases. For the purposes of this Opinion, Donald

McGee, Greentree Associates, L.L.C., and McGee Enterprises may be referred to collectively as the “Appellants.”

Pursuant to Section 59-A-4.4 of the Montgomery County Zoning Ordinance, codified as Chapter 59 of the Montgomery County Code (the Zoning Ordinance), the Board held a public hearing on the appeals on June 9, July 13, and July 14, 2004. Stephen J. Orens, Esquire, and Kinley R. Dumas, Esquire, represented the Appellants. Assistant County Attorney Malcolm Spicer represented DPS. Norman G. Knopf, Esquire, represented Michael and Shari Wohl and the Huntington Terrace Citizens Association, who intervened in the cases.

Decision of the Board: Administrative appeals **denied**.

FINDING OF FACT

The Board finds by a preponderance of the evidence that:

1. The Property, known as 8804 Old Georgetown Road, is located in the R-60 zone at the southwest corner of Greentree Road and Old Georgetown Road in Bethesda, Maryland. The Property is trapezium-shaped and consists of about 13,371 square feet. The Property is identified as Lot 28 of Block 2 of the Huntington Terrace subdivision.

The Property is improved with a one-story 24.3’ by 14.5’ building located in the southeast portion of the lot. To the west of the building is a grassy area. The northern portion of the lot is a paved parking area.

The building on the Property, known as the Bethesda Community Store, was built in 1924 and was designated as a County historic resource by District Council Resolution 10-1969 in 1986. It has continuously operated as a lunch restaurant and retail convenience store.

2. On March 12, 2004, Edward Calloway, a zoning investigator for DPS, visited the Property and discovered that Donald McGee was selling lobsters from a truck located on the lot. Mr. Calloway issued two Notices of Violation to Mr. McGee for selling seafood without a vendor’s license and for selling seafood in a residential zone.

On March 30, 2004, Frank DeLang, another zoning investigator, visited the Property and observed an 8’ by 24’ trailer located on the parking lot. The trailer was being used to store goods and materials used in the Community Store. Mr. DeLang cited Greentree Associates LLC for illegally extending a nonconforming use.

On April 30, 2004, Mr. McGee applied to DPS for a one-year, site-specific vendor's license to sell fresh seafood at the Property. By letter dated May 3, 2004, DPS denied the Appellant's application because the Property is located in a residential zone which does not permit retail sales.

3. The Appellants filed these timely appeals.

4. Gwen Wright, the historic planner for the Historic Preservation Commission, testified that the Bethesda Community Store was designated as an historic resource because of its historical function as a community store and not for its architecture. Arnold Fainman, the operator of the Bethesda Community Store, testified that the trailer was originally placed upon the Property temporarily to sell Christmas trees, but has remained and is used for storage for the store. Donald McGee testified that he began selling seafood from the Property in 2001.

CONCLUSIONS OF LAW

1. Section 8-23 of the Montgomery County Code authorizes any person aggrieved by the issuance, denial, renewal, or revocation of a permit or any other decision or order of DPS to appeal to the County Board of Appeals within 30 days after the permit is issued, denied, renewed, or revoked, or the order or decision is issued. Section 59-A-4.3(e) of the Zoning Ordinance provides that any appeal to the Board from an action taken by a department of the County government is to be considered *de novo*. The burden in this case is therefore upon the County to show that the Notice of Violation was properly issued.

2. The pertinent facts of the case are undisputed. The parties are in agreement that the Bethesda Community Store is a use that has continued in operation since 1924. They also agree that neither the sale of seafood from the Property nor the location of the trailer for the storage of goods and supplies on the site were part of the Community Store's original use. Where their positions diverge, however, is whether these new uses are illegal.

DPS contends that the Bethesda Community Store constitutes a nonconforming use, but that the Appellants' seafood sales and storage trailer at the Property violate the Zoning Ordinance because they were not part of, nor a permitted intensification of, the original nonconforming use and are therefore commercial uses that are prohibited in a residential zone. DPS also contends that the Appellants' unlicensed seafood sales violate Chapter 47 of the County Code because it constitutes the sale of goods or services from a vehicle, or temporary stand or structure, that is parked or otherwise temporarily located on private property while goods are sold or services dispensed. DPS further argues that the denial of the Appellants' "site specific" vendor's license application was proper because commercial sales are not permitted in a residential zone.

The Appellants counter all of these asseverations with a single novel argument. They contend that District Council Resolution 10-1969, which designated the Bethesda Community Store and its environment as a historic resource, also served to prospectively authorize the commercial use of all of the Property as a “grandfathered” use. In essence, the Appellants urge us to take the position that, by the use of a single word contained in an historic resource designation resolution, the District Council created a permitted use which applies only to the Property and which supercedes the entire Zoning Ordinance. For reasons we shall explain, we must decline to make this leap of logic.

3. The Appellants rely on language contained in the Resolution which refers to the Bethesda Community Store as “one of the few surviving early 20th century commercial structures in Montgomery County still providing insight into everyday life in early predevelopment Bethesda.” It further states that the building “along with the *grandfathered* commercial use and its historical setting combine to convey a strong sense of an earlier time and place in contrast to its immediate surroundings” (*italics added*). In designating the Property as a historic resource, the Resolution further states:

“Because any changes to the site could affect the store’s commercial operation, the entire .567 acre parcel is designated as the environmental setting to be reviewed under the Preservation Ordinance. Features of the setting include the store itself, the parking area, service delivery area, storage shed, and picnic and lawn areas toe th rear of the parcel. The environmental setting may be reduced if the Historic Preservation Commission finds it necessary for the appropriate use of the property by the owner, and that the historical value would be retained.”

It is from this language, and in particular the use of the word “grandfathered,” that the Appellants glean a legislative intent not merely to recognize the continued nonconforming use of the Store, but also to authorize any future commercial use of Property *ad infinitum*. The Appellants argue that the Council used the word “grandfathered” to denote a “grandfather clause” - that is, as a means of exempting the Property from the use restrictions of the Zoning Ordinance. We find that this interpretation, however, stretches the words and purpose of the Resolution beyond all reasonable bounds. First, nowhere in the Resolution or in the Zoning Ordinance does the Council use express language to exempt the Property from the Zoning Ordinance. Ordinarily, if the legislature wishes to render an existing use conforming, it does so in no uncertain words. See, e.g., Article 59-B. Indeed, it is a basic tenet of statutory construction that a reviewing authority should not read into a statute exceptions that are not specifically set forth therein. *State v. Magliano*, 7 Md. App. 286, 255 A.2d 470 (1969). In particular, “grandfather rights” are considered exceptions to statutes that must be strictly and narrowly construed. *Radio Communications, Inc v. Public Service Commission*, 50 Md. App. 422, 441 A.2d 346 (1982). We think

that if the legislature had intended to “grandfather” the Property to permit all commercial uses, it would have done so expressly and in the Zoning Ordinance as it has in other cases.

In ascertaining the intent of the legislature, we must also consider the context in which the language is used. In this case, the Appellants attempt to construe the word “grandfathered” to refer to an exception to the use restrictions of the Zoning Ordinance. They argue that the District Council could not have meant anything else. As the intervenor’s counsel correctly pointed out, however, when the term “grandfathered” is used in connection with a land use, it more commonly refers to a nonconforming use. 62 AmJur Trials §10. We think it is more likely than not that the District Council was referring to the Bethesda Community Store’s status as a nonconforming use than to any attempt to carve out an exception to the Zoning Ordinance.

Moreover, the overall context in which the language appears belies any intent to amend the Zoning Ordinance. First, the language is contained in a narrative description of the Property, not in any enacting language. Second, the language is contained within an instrument the sole purpose of which is to designate the Property as an historic resource. Such designation has the effect of bringing the Property under the protections of the historic preservation provisions of Article 24A of the Code. Article 24A governs the preservation and protection of the exterior of historic and architecturally significant structures and sites; it does not, however, concern itself with the uses of those sites. See Article 28, Section 8-101(c), *Annotated Code of Maryland*. The regulation of land uses, on the other hand, is the exclusive province of Article 59. It is incongruous to presume that the legislature would provide an exception to the Zoning Ordinance through a document with a wholly unrelated purpose. While, as the Appellants have pointed out, the Council has in the past legislated some zoning “flexibility” for designated historic resources, it has done so expressly within the Zoning Ordinance. Section 59-A-6.2. It is worthy to note that none of these exceptions permit uses other than those enumerated within the Zoning Ordinance.

Finally, we find a case cited by the Appellants themselves to be dispositive. In *West Montgomery Citizens Association v. Maryland-National Capital Park and Planning Commission*, 309 Md. 183, 522 A.2d 1328 (1985), the Maryland Court of Appeals found that the County Council for Montgomery Council, sitting as the district council, is legally precluded, by the express and unequivocal language of the statute that granted it zoning power (Article 28), from exercising that power in any manner other than that specifically authorized - - namely, by the zoning map and zoning text amendment procedures. Thus, where the District Council purports to act in the exercise of its zoning authority, it must do so by adopting or changing the zoning text or zoning map. The Court held that the approval of amendments to the Master Plan by resolution does not come within the mandated procedures for legislative zoning action. Consequently, if the Council had in fact intended, as the Appellants aver, to

create an exception to the land use restrictions of the Zoning Ordinance, then it should have done so by zoning text or map amendment. A resolution designating the Property as a historic resource is ineffective as an exercise of the zoning power. Simply put, the Council could not have intended to, and in fact did not, “grandfather” the commercial use of the Property, because it did not use the proper procedures to do so.

4. We therefore conclude that District Council Resolution 10-1969 did not authorize the commercial use of the Property. Because it is zoned R-60, the Property may be used commercially, if at all, only within the context of the existing nonconforming use. The Appellants concede that the sale of seafood on the site, which began in 2001, is not within the nature or extent of the original nonconforming use. Consequently, DPS properly issued its Notice of Violation dated March 12, 2004, for conducting retail sales in a residential zone on the Property in Case No. A-5983.

In addition, because such sales at the Property are prohibited under the Zoning Ordinance, DPS properly cited the Appellants for conducting vending activities at a specific site in Case No. A-5982 and properly denied the Appellants’ application for a “site-specific” vendor’s license under Article 47 in Case No. A-5994.

We also find that the preponderance of the evidence indicates that the location of the trailer on the Property and its use as storage for goods and supplies used in the Bethesda Community Store is an unauthorized expansion of the original nonconforming use. DPS therefore properly issued its Notice of Violation dated March 30, 2004, for the extension of a nonconforming use at the Property.

5. The appeals in Cases A-5982, A-5983, A-5984, and A-5994 are **DENIED**.

Members Louise L. Mayer and Angelo M. Caputo were necessarily absent from the July 14, 2004 hearing and did not participate in the decision. On a motion by Member Allison Ishihara Fultz, seconded by Vice Chairman Donna L. Barron, with Chairman Donald H. Spence in agreement, the Board voted 3 to 0 to deny the appeals and adopt the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above be adopted as the Resolution required by law as its decision on the above entitled petition.

Allison Ishihara Fultz
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 1st day of February, 2005.

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within ten (10) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 2-A-10(f) of the County Code).

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure.